MOHAMED TAIB HAJI IBRAHIM & ANOR. v. PERWIRA HABIB BANK MALAYSIA BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) July 15 & August 18, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 247 of 1986]

Practice and Procedure – Claim on guarantee – Default judgment – Application to set aside default judgment – Serious questions of law to be considered – Unconditional leave to defend granted.

Banking – Guarantee – Overdraft – Temporary overdraft – Claim on guarantee – Default judgment – Serious questions of law to be considered – Leave to defend granted.

The respondent had obtained judgment against Malbina Sdn. Bhd. for the sum of $141,222.52 due on a loan. The appellants and four other persons had signed a letter of guarantee in regard to the loan. The respondent demanded payment from the appellants and the four other persons. When the judgment sum and interest were not settled, the respondents brought action against all six of them. Judgment in default of defence was entered against both the appellants. The appellants applied to set aside the default judgment. The application was dismissed in the High Court and the appellants appealed. It was submitted that when they executed the letter of guarantee there was no consideration and if there were consideration it was based on past consideration. It was also argued that the request in this case was for a temporary overdraft of $50,000 and not for continuing overdraft facilities. If the appellants were to be held legally liable their liability, it was contended, should be limited to the maximum sum of $50,000 only.

Held: the appellants have succeeded in raising serious questions of law which merited mature consideration and therefore unconditional leave should be given to the appellants to defend the action.

Case referred to:

(1) *Osman bin Abdul Ghani & Ors.* v. *United Asian Bank Bhd.* [1987] 1 M.L.J. 27.

SUPREME COURT.

Krishna Aiyar for the appellants.
Miss J. Doshi for the respondents.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): We allowed the appeal, set aside the default judgment dated June 2, 1984, and ordered that the appellants be given unconditional leave to defend. Here are our reasons for doing so.

The respondents are a licensed bank carrying on business in Kuala Lumpur. On May 9, 1978 the appellants executed a letter of guarantee to be jointly and severally liable to the respondents for due repayment of the loan of Malbina Sdn. Bhd. together with interest, charges commission and costs. It appeared that on July 20, 1977, Ashaari bin Hj. Ahmad, Kamaruddin bin Suleiman, Lim Sin Kit and Norimah binti Hj. Ahmad, the 1st, 2nd, 3rd and 4th defendants in the court below, also signed a letter of guarantee, jointly and severally guaranteeing to the respondents due repayment of all moneys which shall at any time be due to the respondents from Malbina Sdn. Bhd. together with interest, charges, commission and costs.

On February 11, 1982, the respondents obtained judgment against Malbina Sdn. Bhd. for the sum of $141,222.52 together with interest and costs *vide* Kuala Lumpur High Court Civil Suit No. C186/1979. By a letter dated July 8, 1983, addressed to each of the four defendants abovementioned as well as the appellants herein, the respondents demanded payment of the said judgment sum of $141,222.52 and interest thereon. When all the four defendants and the appellants failed to settle the judgment sum and interest the respondents took out a writ against all the six of them. Judgment in default of defence was entered against both the appellants on June 2, 1984.

Application was made to set aside the default judgment. First, it was submitted by learned counsel for the appellants that when they executed the letter of guarantee on May 9, 1978, there was no consideration and if there were consideration, it was based on past consideration. The respondents filed an affidavit in reply stating, *inter alia,* that they were in the midst of commencing legal proceedings against Malbina Sdn. Bhd. unless the outstanding debt was paid by January 31, 1978. As Malbina Sdn. Bhd. were unable to repay the debt and in order to allow the respondents to forbear from instituting legal action the appellants executed the letter of guarantee aforesaid. It is pertinent to note that both the appellants were not appointed directors of Malbina Sdn. Bhd. until April 4, 1978 (see page 49 of the record). In *Osman bin Abdul Ghani & Ors.* v. *United Asian Bank Bhd.*[1] this court held that forbearance could be inferred from the facts of the case. There the respondent bank was on the verge of suing the company (principal debtor) but was willing to forbear when the appellants, who were directors of the company at the material time, gave the second guarantee. Clearly, the second guarantee was given for the benefit of the company by giving the company time to arrange for the payment of the

debt. Here, when the respondents threatened to sue Malbina Sdn. Bhd. by January 31, 1978, both the appellants were not directors of the company. Nor was there any evidence to indicate that they were in any way connected with the company at the material time. Secondly, learned counsel for the appellants argued that the letter dated April 28, 1978 (see page 50 of the record) and addressed to the respondents was a request for a "temporary" overdraft of $50,000.00 and not for a "continuing" overdraft facilities. Lastly, it was contended by learned counsel for the appellants that if the appellants were to be held legally liable their liability should be limited to the maximum sum of $50,000.00 only.

The learned judge did not appear to attach any legal significance to the differences between "temporary" and/or "continuing" overdraft and therefore did not seem to have considered them in his judgment. However, the learned judge disposed of these submissions in this manner:

"Paragraphs 11 and 13 of enclosure 21 set out the circumstances in which the 5th and 6th defendants (the appellants in this appeal) came to be guarantors and demonstrate without challenge that the consideration for the guarantee was forbearance to sue and the allowing of the principal borrower to continue to use the overdraft facility. The bank statements exhibited show that the principal debtor was allowed to increase the amount outstanding from $94,374.07 on May 8, 1978 to $132,979.13 by May 31, 1978 which increase was effected after the execution of the guarantee by the 5th and 6th defendants ..."

In our judgment, the appellants had succeeded in raising serious questions of law which merited mature consideration. The issues could more appropriately be decided by way of the hearing of a preliminary issue without a full trial with witnesses. For these reasons, we disagreed with the learned judge and gave unconditional leave to the appellants to defend the action.

Appeal allowed.

Solicitors: *Majid, Krishna, Menon & Lee; Tunku Zuhri, Manan & Abdullah.*

ABDUL GHAPUR BIN HAJI SALLEH v. TUN DATUK HAJI MOHAMED ADNAN ROBERT, YANG DI-PERTUA NEGERI SABAH & 7 ORS.

[O.C.J. (Abu Mansor J.) March 20, 1986]

[Kota Kinabalu – Originating Summons No. 27 of 1986]

Constitutional Law – State Legislative Assembly – Dissolution of – Challenge to its validity – Application for declarations – Whether third to seventh defendants were government officers – Whether injunction could issue against them to conduct general election – Federal Constitution, art. 113 – Sabah Constitution, arts. 10 & 21(4) – Government Proceedings Ordinance, 1956, s.29(2) – Chief Minister (Incorporation) Ordinance, s.5 – Evidence Act, 1950, s.4(3).

By originating summons dated March 1, 1986, the plaintiff applied for four declaratory reliefs, to the effect that the dissolution of the Sabah State Legislative Assembly was null and void and of no effect and that the third to eighth defendants were not entitled to act under article 113 of the Federal Constitution and call or conduct a general election under article 21(4) of the Sabah Constitution. In the present application, the plaintiff sought an injunction to restrain the third to eighth defendants by themselves or by any person acting on their behalf from acting under article 113 of the Federal Constitution upon the Proclamation of Dissolution until the hearing and disposal of the main summons. The plaintiff claimed that there were serious questions to be tried. Summons against the fifth defendant was struck out, thus leaving seven defendants in the originating summons. It was submitted on behalf of the third to seventh defendants that an injunction is not available to the plaintiff as under section 29(2) of the Government Proceedings Ordinance, 1956 no injunction could be granted against an officer of the Government if the effect of granting the injunction or making the order would be to give relief against the officers which would not have been obtained in proceedings against the Government.

Held, dismissing the plaintiff's application: (1) the dissolution of the Legislative Assembly of Sabah by the first defendant under article 21(2) of the State Constitution was a legislative act and not an executive act. The Proclamation was *prima facie* valid until declared otherwise, and the clear duty of the Election Commission could only be to hold an election within the prescribed period. In the public interest or in the interest of justice, the court exercised its discretion and refused to issue an injunction against the third to seventh defendants;

(2) the third to seventh defendants were in the employment of the Federal Government and there could not be other interpretation as their salaries were paid by the government.

Cases referred to:

(1) *Tengku Hj. Jaafar & Anor.* v. *Government of Pahang* [1978] 2 M.L.J. 105.
(2) *Tio Chee Hing* v. *Government of Sabah* [1981] 1 M.L.J. 207.
(3) *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396.
(4) *N.W.L. Ltd.* v. *Woods* [1979] 3 All E.R. 614.